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No. 92-1995

In the Supreme Court of the United States

OCTOBER TERM, 1993

ADVANCE CHEMICAL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 107(a)(4)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) subjects parties that are responsible for the threatened or actual release of hazardous substances to liability for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A). The questions presented are:

1. Whether a responsible party may avoid liability for the costs of remedial or removal actions that are not inconsistent with the national contingency plan on the ground that the costs are unreasonable.

2. Whether the court of appeals erred in declining to reopen the district court's prior grant of partial summary judgment awarding the United States certain response costs for the hazardous waste site.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 982 F.2d 1436. The opinions of the district court (Pet. App. 28a-251a, 252a-285a) are reported at 750 F. Supp. 1460 and 733 F. Supp. 1424.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1992. A petition for rehearing was denied on February 17, 1993. Pet. App. 26a-27a. On May 4, 1993, Justice White extended the time for filing a petition for a writ of certiorari to and including June 17, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, subjects parties that are responsible for the threatened or actual release of hazardous substances to liability for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A). Petitioners, who are responsible parties at the Hardage waste disposal site, present an interlocutory challenge to the court of appeals' determination that the United States is entitled to recover response costs that the government has incurred to remedy conditions at that site.

1. Congress enacted CERCLA in 1980 to "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 22 (1980). Congress intended that the government be given "the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal," and that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Walls* v. *Waste Resource Corp.*, 823 F.2d 977, 980 (6th Cir. 1987), quoting *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).[1]

[1] Congress conferred the powers granted under CERCLA to the President, who has delegated authority to the Adminis-

CERCLA provides EPA with two principal methods for achieving cleanup of hazardous waste sites. First, Section 104 of CERCLA authorizes EPA to perform removal or remedial actions, known as response actions, using the Hazardous Substance Superfund. 42 U.S.C. 9604; see 42 U.S.C. 9601(23) (defining a removal action); 42 U.S.C. 9601(24) (defining a remedial action). See also *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990). Second, Section 106(a) of CERCLA empowers EPA to issue an administrative order or to obtain a judicial injunction requiring the responsible parties to undertake response actions. 42 U.S.C. 9606(a).

If EPA performs the response action, then the United States may recover the government's response costs by bringing a cost recovery action against responsible parties pursuant to Section 107(a) of CERCLA. 42 U.S.C. 9607(a). Private parties that undertake response actions may also recover costs from responsible parties to the extent that they can show that the costs were "necessary." 42 U.S.C. 9607(a). Specifically, Section 107(a)(4) states that responsible parties are liable for

> (A) *all* costs of removal or remedial action incurred by the *United States Government* or a State or an Indian tribe not inconsistent with the national contingency plan;

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trator of the Environmental Protection Agency (EPA). See Exec. Order No. 12,580, 3 C.F.R. 193 (1988). Congress has revised CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA). Pub. L. No. 99-499, 100 Stat. 1613.

> (B) any other *necessary* costs of response incurred by *any other person* consistent with the national contingency plan[.]

42 U.S.C. 9607(a)(4)(A) and (B) (emphasis added). The national contingency plan (NCP), which EPA has promulgated as a regulation pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, prescribes methods for investigating, planning, and undertaking response actions. See 40 C.F.R. Pt. 300. The NCP sets out a framework for selecting response actions and provides guidance as to what types of response actions are appropriate. See 40 C.F.R. 300.64-300.71 (1989); 40 C.F.R. 300.400-300.435 (1990). See generally Pet. App. 8a-10a.

2. In September 1972, Royal Hardage began accepting hazardous substances for disposal at a site near Criner, Oklahoma. The Hardage site operated from September 1972 until November 1980, during which time more than 20 million gallons of waste were transported to the site and treated, stored, or disposed of at that location. Pet. App. 6a, 40a. Since 1980, EPA has conducted extensive investigations and administrative review to determine the extent of contamination at the Hardage site, the liable parties, and possible remedial actions to clean up the site. *Id.* at 40a-41a.

On June 25, 1986, the United States filed this action, on behalf of the EPA, against 32 generators and three transporters, each of whom purportedly shipped between 100,000 and 1.7 million gallons of hazardous wastes to the site. Pet. App. 43a. The complaint requested injunctive relief under Section 106(a) of CERCLA to require defendants to clean up the site. The complaint also sought recovery under

Section 107(a)(4)(A) of response costs incurred by the United States. Pet. App. 43a.

Most defendants named in the complaint organized themselves as the Hardage Steering Committee (HSC), and on September 8, 1986, the HSC defendants filed an answer and a counterclaim against the United States contending that several federal agencies, as entities also responsible for contamination at the site, were liable for response costs incurred by HSC, pursuant to Section 107(a)(4)(B) of CERCLA. Pet. App. 20a. HSC ultimately stipulated as to liability under Sections 106 and 107(a), and the proceedings then continued as to response cost claims and remedy. Pet. App. 43a.

3. On September 11, 1989, the United States moved for partial summary judgment pursuant to Section 107(a)(4)(A) for past response costs—specifically, for Department of Justice expenses incurred through the end of the second fiscal quarter of 1989 (March 31, 1989) and for EPA expenses incurred through the end of the first fiscal quarter of 1989 (December 31, 1988). See Pet. App. 253a. The United States requested direct costs totalling $5,441,201, including, among other things, payroll and travel costs, the costs of studies and investigations for the Hardage site, installation of monitoring wells, the collection of samples and laboratory analysis, and other response activities. *Id.* at 259a-262a, 267a, 275a. The United States requested indirect costs totalling $850,864, attributable to the Department of Justice's enforcement program, but not allocated to specific cases. *Id.* at 275a-276a. The United States also requested a declaratory judgment that defendants are liable for future response costs. *Id.* at 279a.

In response, HSC made no assertion that the United States' response costs were inconsistent with requirements of the NCP, and its brief opposing summary judgment contained no citation to any provision of the NCP. See Pet. App. 267a-285a. Rather, HSC asserted that the United States' costs were "unnecessary" or "improperly performed," that data were "unacceptable or unusable," or that the results were "not useful to remediation of Hardage." *Id.* at 269a. HSC also contended that certain costs were incurred in violation of federal procurement regulations, and that the United States failed to document that some costs were incurred at the Hardage site. *Id.* at 271a.

The district court granted partial summary judgment to the United States for all direct response costs, denied summary judgment as to indirect costs, and granted a declaratory judgment for future costs. Pet. App. 254a-255a. As to direct costs, the court found that the United States had "submitted extensive documentation" demonstrating a prima facie case, including affidavits and summaries of cost data, and that the burden shifted to HSC to demonstrate inconsistency with the NCP. *Id.* at 267a-268a. The court held that HSC "totally failed to meet this burden." *Id.* at 275a. As to claims that costs were unreasonable or unnecessary, the court found that, under the plain statutory language, the United States "is entitled to recover *all* response costs at the Hardage site not inconsistent with the N.C.P." and HSC "failed to produce any evidence" demonstrating inconsistency with any provision of the NCP. *Id.* at 269a-270a (emphasis in original). As to federal procurement regulations, the court found neither

authority as to their relevance to the NCP nor "any evidence" that there was a violation of such regulations. *Id.* at 271a. The court also held that assertions that costs were not incurred at the Hardage site were "conclusionary" and "without merit." *Id.* at 272a.

The court ruled that indirect costs may be recovered under Section 107(a)(4)(A) and that the United States had established a prima facie case, but that the record at that time was insufficient to warrant summary judgment. Pet. App. 279a. The court also granted the United States a declaratory judgment "for liability for future response costs associated with the Hardage site except the DOJ indirect costs." *Id.* at 280a.

4. The district court conducted a trial from November through December 1989. It issued an opinion on August 9, 1990, addressing additional response cost claims and the selection of a cleanup remedy. With respect to costs, the court granted the United States' request for supplemental direct costs of $925,684, covering claims within the same categories of direct cost awarded on summary judgment, but generally updated through the end of the second fiscal quarter of 1989 (March 31, 1989). Pet. App. 113a-114a. The court also awarded the United States indirect costs through that period, totalling $1,516,245, finding that HSC failed to prove that such costs were inconsistent with the NCP. *Id.* at 112a, 117a, 122a. See *id.* at 127a.

At trial, HSC and the United States presented the court with alternative remedies. The HSC and the United States alternatives contained common elements, but the United States alternative contained two additional components. Pet. App. 76a-77a & n.30.

The HSC remedy consisted of a series of on-site trenches and recovery wells, a water treatment system, and groundwater and surface monitoring, *id.* at 76a-77a, all of which the United States accepted, *id.* at 59a. In addition, the United States proposed partial excavation and removal offsite of materials in certain areas of the site and soil vapor extraction to remove highly toxic and mobile compounds from the subsurface. *Ibid.*[2]

The court adopted the HSC remedy with modifications providing for additional liquid recovery wells. Pet. App. 76a. The court found that HSC had demonstrated that this remedy "satisfies the section 106(a) standards for health and welfare and the environment," and is "most consistent" with the NCP. *Id.* at 90a. The court recognized that EPA's additional measures—excavation and soil vapor extraction—are effective methods for remediating hazardous waste sites, but the court concluded that the government had failed to demonstrate that they were appropriate remedies at the Hardage site. *Id.* at 59a, 71a-76a.

The court also ruled on HSC's counterclaim for response costs. The court concluded that $3.7 million of HSC's claimed $9.5 million in costs were "necessary costs of response" under Section 107(a)(4)(B). Pet. App. 129a. The court found that the remaining

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[2] The government began development of its excavation/vapor extraction remedies in the spring and summer of 1989, in conjunction with so-called "clean slate" remedy negotiations with HSC. EPA issued the Record of Decision for that remedy in November 1989. See Pet. App. 57a. Thus, the United States' pretrial response cost claims, which extended only through March 1989, did not include costs associated with those remedies.

costs were not "necessary" because they were duplicative and vague, *id.* at 151a, lacked adequate documentation, *id.* at 151a-152a, were litigation oriented, *id.* at 150a-154a, and included "extravagant" charges such as a $1000 dinner for HSC's expert panel, *id.* at 154a-155a.

The court entered a judgment pursuant to Fed. R. Civ. P. 54(b), directing HSC to implement the remedy determined at trial and awarding the United States its response costs. Appellants' C.A. Br. App. A 2-3, 9-10, 14. The court also declared that the defendants would be liable for future response costs, defined as costs incurred from April 1, 1989, for Department of Justice expenses, and from January 1, 1989, for EPA expenses. *Id.* at 10.

5. HSC appealed the district court's determination that the United States was entitled to response costs, and the court of appeals rejected that challenge. The court explained that Section 107(a)(4)(A) of CERCLA allows the United States to recover "*all* costs" for response actions not inconsistent with the NCP. Pet. App. 13a (emphasis added by the court). Notwithstanding the plain language of the statute, "HSC failed to identify any response actions by the government that were inconsistent with the NCP" and instead asserted only that individual costs were unreasonable or excessive. *Ibid.*

The court of appeals specifically declined to reopen the district court's order of partial summary judgment on the pretrial response cost issues. Pet. App. 15a-17a. The court held that the "time at which HSC was required to establish the existence of a genuine issue of inconsistency with the NCP, as to the particular response costs submitted by the govern-

ment at summary judgment, was long past when the remedy phase of the trial began." *Id.* at 17a. Thus, "[t]o defeat the government's claim for those response costs, HSC was required to establish a genuine issue of inconsistency with the NCP at the summary judgment phase, when recoverability of those particular government response costs was at issue." *Ibid.*

Finally, the court clarified that the declaratory judgment, holding HSC liable for future response costs, does not bar HSC from opposing the recoverability of those costs as inconsistent with the NCP. Pet. App. 18a. The court held that "a defendant who is declared liable for future response costs may still challenge those costs as unrecoverable because the underlying response actions giving rise to the costs are inconsistent with the NCP." *Ibid.*

ARGUMENT

Petitioners challenge the court of appeals' affirmance of a district court judgment awarding the United States costs it has incurred in responding to threatened and actual releases of hazardous substances at the Hardage site. Contrary to petitioners' arguments, the court of appeals' decision is correct, it does not conflict with any decision of this Court or of another court of appeals, and it raises no issue warranting review by this Court.

1. The United States is entitled to response costs under CERCLA pursuant to Section 107(a)(4)(A), which states that the parties responsible for site contamination are liable for

> all costs of removal or remedial action incurred by the United States Government or a State or an

> Indian tribe not inconsistent with the national contingency plan.

42 U.S.C. 9607(a)(4)(A). As the court of appeals explained, this language authorizes the United States "to recover '*all* costs'" for response actions, provided that those actions are not inconsistent with the NCP. Pet. App. 13a (emphasis added by the court). By contrast, private parties may recover only "necessary costs" (42 U.S.C. 9607(a)(4)(B)) for response actions that are "consistent" with the NCP. Pet. App. 10a-11a.

Petitioners attack the court of appeals' interpretation of CERCLA's cost recovery provisions, charging that the court "rewrote" Section 107(a)(4)(A) by precluding defendants from challenging the government's costs per se and by requiring them to challenge the government's response actions. Pet. 8.[3] Petitioners' argument reveals their continuing misunderstanding of the role of the NCP. The NCP does not contain standards for evaluating costs per se. Rather, the NCP prescribes the standards for investigating, planning, choosing and undertaking "removal or remedial action." As the court of appeals explained:

> The NCP regulates *choice of response actions*, not costs. *See* 40 C.F.R. §§ 300.65, 300.68 (1989). Costs, by themselves, cannot be inconsistent with the NCP. Only response actions—i.e., removal or

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[3] Significantly, petitioners quote Section 107(a)(4)(A), but they submerge beneath ellipses the words "removal or remedial action." See Pet. 8 (stating that the United States may recover "all costs . . . incurred . . . not inconsistent with" the NCP); compare 42 U.S.C. 9607(a)(4)(A) (quoted in the text above).

> remedial actions—can be inconsistent with the NCP, which can be demonstrated by a showing that the government's choice of response action was arbitrary and capricious. As long as the government's choice of response action is not inconsistent with the NCP, its costs are presumed to be reasonable and therefore recoverable.

Pet. App. 13a-14a, citing *United States* v. *Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726, 747-748 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

Like the current NCP, the NCP in effect during the time period relevant to this case contained criteria and procedures for determining whether a short-term removal action is appropriate at a particular site, see 40 C.F.R. 300.65 (1989), and for assessing and selecting a permanent remedy, see 40 C.F.R. 300.68 (1989), but it contained no criteria for evaluating how much a selected remedy should cost to implement. Thus, as the court of appeals correctly explained, the government's costs in implementing a remedy could be inconsistent with the NCP only if the underlying "removal or remedial action" was inconsistent with the NCP. Pet. App. 13a-14a. The court of appeals affirmed the district court's conclusion that petitioners failed to make that showing here, *id.* at 14a-15a, and that factbound question does not warrant review by this Court. Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Petitioners' contention (Pet. 8-12) that the court of appeals' decision conflicts with the decisions of other courts of appeals is without merit. The courts have uniformly held that Section 107(a)(4)(A) of CERCLA authorizes the United States "to recover *all* costs"

not inconsistent with the NCP and that responsible parties have the burden of demonstrating inconsistency. See *United States* v. *R.W. Meyer, Inc.*, 889 F.2d at 1504; *NEPACCO*, 810 F.2d at 747-748; *O'Neil* v. *Picillo*, 682 F. Supp. 706, 728-729 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). The cases that petitioners cite as conflicting authority present no conflict whatsoever.

Petitioners first cite (Pet. 8-9) the decisions in *Lone Pine Steering Committee* v. *United States Environmental Protection Agency*, 777 F.2d 882, 887-888 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986), and *J.V. Peters & Co.* v. *Administrator, EPA*, 767 F.2d 263, 266 (6th Cir. 1985). Those cases, however, do not even involve Section 107(a)(4)(A) cost recovery actions. Instead, they address only whether responsible parties may obtain judicial review of an EPA response action prior to its enforcement. See *Lone Pine*, 777 F.2d at 883; *J.V. Peters*, 767 F.2d at 264. While those decisions contain dicta properly noting that responsible parties may challenge the government's costs once a cost recovery action is brought, they neither address nor contradict the court of appeals' interpretation of Section 107(a)(4)(A).

Petitioners next rely (Pet. 10-11) on the Eighth Circuit's decision in *NEPACCO*, *supra*. *NEPACCO* did involve a cost recovery action, but the court of appeals explicitly *followed* that decision in this case. Pet. App. 10a-11a. The Eighth Circuit, like the court of appeals here, held that responsible parties cannot contest the "reasonableness" of the government's costs, but instead must show that the costs are inconsistent with specific provisions of the NCP. See *NEPACCO*, 810 F.2d at 747-748 ("'all costs' incurred

by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable"). The Eighth Circuit's application of that principle in *NEPACCO* is entirely consistent with the court of appeals' decision here. The Eighth Circuit considered the defendants' challenge to the government's "choice of a particular cleanup method" and held that the choice was consistent with the NCP, stating that the defendants had "failed to show that the EPA acted arbitrarily and capriciously in choosing the particular method it used to clean up the * * * site." *Id.* at 748. Compare Pet. App. 11a.[4]

2. Petitioners also raise (Pet. 12-15) policy objections to the court of appeals' decision, contending that the court of appeals' construction of Section 107(a)(4)(A) will result in government "waste and abuse." Pet. 13. Petitioners suggest that the government may employ "gold plated bulldozers" and "throw lavish parties at the close of each day's work" and then "send the bills for these excessive charges to liable parties." Pet. 14. Petitioners' rhetoric overlooks the fact that it was the petitioners—who are responsible for creating the hazardous conditions at the Hardage site—that attempted to bill the government for a $1000 dinner and other "extravagant" charges as "necessary" response costs. See Pet. App. 154a-155a.

In any event, Congress has considered the possibility of "unnecessary" expenditures, but has concluded

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[4] Accord *O'Neil*, 682 F. Supp. at 729 ("defendants have the burden of demonstrating that the clean-up, because of some variance from the [NCP], resulted in demonstrable excess costs for which they should not be responsible").

that the courts should not be pressed into service as inspectors general for government cost recovery actions. Section 107(a)(4) instructs the courts to examine site clean-ups for consistency with the NCP, but it directs that the courts shall not otherwise engage in second-guessing the government's judgment as to what constitute "necessary" costs for cleaning up a hazardous waste site. Compare 42 U.S.C. 9607(a)(4)(A) (stating that the responsible parties are liable for "all costs" that the government incurs for response actions that are "not inconsistent with" the NCP) with 42 U.S.C. 9607(a)(4)(B) (allowing private parties to recover "necessary costs" that are "consistent with" the NCP). Instead, Congress itself has carefully policed the CERCLA program for waste and abuse. See Pet. 13 n.6 (citing various GAO reports). There is no need for already overburdened courts, which have limited technical and accounting resources and expertise, to carry out that task.

3. Petitioners contend (Pet. 15-21) that the court of appeals incorrectly declined to reopen the pretrial award of partial summary judgment for response costs incurred prior to trial. Petitioners assert that the court of appeals should have reviewed the district court's pretrial award in light of the evidentiary record developed at trial concerning the government's proposed remedy. They assert that had the court of appeals done so, that court would have disallowed the award of pretrial response costs, and that failure to do so raises a conflict with the Seventh, Ninth and Eleventh Circuits concerning the "scope of appellate review of an interlocutory order shown to be erroneous." Pet. 15.

Petitioners are wrong in asserting that the court of appeals' decision gives rise to a conflict among the courts of appeals. As petitioners acknowledge (Pet. 16), the court of appeals' statement that review of a grant of partial summary judgment "is confined to an examination of the materials before the court at the time the ruling was made," Pet. App. 16a, is consistent with the First Circuit's decision in *Voutour* v. *Vitale*, 761 F.2d 812, 817 (1985), cert. denied, 474 U.S. 1100 (1986); and the Federal Circuit's decision in *Glaros* v. *H.H. Robertson Co.*, 797 F.2d 1564, 1569 (1986), cert. dismissed, 479 U.S. 1072 (1987). See also *Nissho-Iwai American Corp.* v. *Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988).

The cases that petitioners cite (Pet. 17-18) as conflicting authority, moreover, are not to the contrary. Two of those cases do not involve summary judgment at all.[5] The remaining Eleventh Circuit cases, which represent petitioners' primary line of authority (Pet. 18), all involve the *denial* of a motion for summary judgment. *Wenzel* v. *Boyles Galvanizing Co.*, 920 F.2d 778, 782 (11th Cir. 1991); *Stuckey* v. *Northern Propane Gas Co.*, 874 F.2d 1563, 1567 (11th Cir. 1989); *Holley* v. *Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375, 1378 (11th Cir. 1988).

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[5] In *Peterson* v. *Lindner*, 765 F.2d 698 (7th Cir. 1985), the court addressed only whether the declaratory judgment that issued in that case was an interlocutory order, allowing a transferee judge to reconsider it prior to final judgment. *Id.* at 704. Similarly, in *Interstate Power Co.* v. *Kansas City Power & Light Co.*, 992 F.2d 804 (8th Cir. 1993), the court addressed only whether the district court had abused its discretion in certifying final judgment under Fed. R. Civ. P. 54(b). 992 F.2d at 805, 806-807.

See also *Trustees of Indiana University* v. *Aetna Casualty & Surety Co.*, 920 F.2d 429, 433 (7th Cir. 1990). Those cases apply the unexceptional principle that if the district court has denied summary judgment, concluding that material issues of fact are in dispute, a party cannot appeal that ruling and ignore the facts later found at trial. The Eleventh Circuit has expressly limited that principle to cases involving the denial of motions for summary judgment, stating:

> We hold only that a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which militate against his case.

Holley, 835 F.2d at 1378. That principle does not apply to a *grant* of summary judgment, which rests on a judicial finding that no material fact is in dispute. Indeed, the Eleventh Circuit's decision in *Holley* explicitly distinguished a case that "involved an appeal from a grant rather than a denial of summary judgment." *Ibid.* (citing *Roper* v. *Edwards*, 815 F.2d 1474 (11th Cir. 1987)). Accord *Stuckey*, 874 F.2d at 1567. Thus, the Eleventh Circuit decisions pose no conflict with the decision in this case.[6]

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[6] The sole case that petitioners cite (Pet. 17) involving a grant of summary judgment, *United States* v. *Desert Gold Mining Co.*, 433 F.2d 713 (9th Cir. 1970), is not on point. That case held only that a district court judge did not abuse his discretion in reconsidering a grant of partial summary judgment by a previous judge in the same case and on the same summary judgment record, where no final judgment had been

Even if the purported conflict existed, there would be no occasion to resolve it in this case, because petitioners have made no showing that the district court's post-trial remedy ruling undermined the prior grant of summary judgment. Petitioners simply assume—without explanation or citation—that the United States' pretrial response costs were associated with the portion of the government remedy that was rejected at trial. See Pet. 18. In fact, the pretrial response costs that the United States requested in its summary judgment motion were for expenditures that would have been incurred regardless of the remedy chosen.[7] Petitioners made no attempt below to show that the pretrial response costs were associated with the proposed-but-rejected excavation or soil vapor extraction remedies. Indeed, the United States' motion sought only costs incurred through the second fiscal quarter of 1989 (ending March 31,

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entered pursuant to Fed. R. Civ. P. 54(b). 433 F.2d at 714-715. In the absence of a Rule 54(b) determination or direction, the district court may revisit its prior grant of partial summary judgment "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). But as we explain in the text that follows, petitioners provided the district court in this case with no reason to reconsider its pretrial summary judgment ruling, and that factbound question would not in any event warrant review by this Court.

[7] Those costs included expenditures for collecting samples of contaminated soil and groundwater, for laboratory analysis, for other studies and investigations for the Hardage site, and for payroll and travel costs. See Pet. App. 259a-262a, 267a. Such general expenditures would be recoverable from responsible parties irrespective of what remedy was ultimately selected.

1989) for Department of Justice expenses, and through the first fiscal quarter of 1989 (ending December 31, 1988) for EPA expenses. See pp. 5-7, *supra*; Appellants' C.A. Br. App. A 10. The United States did not begin development of its trial remedy until the spring and summer of 1989, and it did not issue a Record of Decision for that remedy until November 1989. See Pet. App. 57a. And even if petitioners now contest the character of the pretrial expenses, that factbound matter would not warrant review by this Court.[8]

[8] Pursuant to the district court judgment entered on August 9, 1990, all costs incurred by the Department of Justice after April 1, 1989, and by EPA after January 1, 1989, are defined as "future response costs." Appellants' C.A. Br. App. A 10. As the court of appeals has made clear, petitioners may contest claims for such future costs, if and when presented, on the ground that the underlying response actions are inconsistent with the NCP. Pet. App. 17a-20a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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